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4 In re MORTGAGE FUND '08 LLC,
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6 Debtor.

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10 SUSAN L. UECKER, in her capacity as
11 Trustee of the Mortgage Fund '08
12 Liquidating Trust,
13 Appellant,
14 v.
15 A VERY NICE POOL COMPANY, LTD.,
16 Appellee.

17 Case No. [15-cv-00077-SI](#)

18 Consolidated with 15-cv-00251 SI and 15-
19 cv-00252 SI

20
21 **ORDER AFFIRMING BANKRUPTCY
22 COURT AND DENYING MOTION FOR
23 SANCTIONS**

24
25 Now before the Court are three consolidated appeals by appellant Susan L. Uecker,
26 Liquidating Trustee of the Mortgage Fund '08 Liquidating Trust, from orders of the Bankruptcy
27 Court for the Northern District of California dismissing three adversary proceedings filed by the
28 Trustee. For the reasons set forth below, the Court AFFIRMS the Bankruptcy Court and DENIES
appellees' motion for sanctions.

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30 **BACKGROUND**

31 These consolidated appeals arise out of the bankruptcy of Mortgage Fund '08 ("MF08").¹

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1 MF08 was formed in December 2007 as a Delaware limited liability company for the stated
2 purpose of raising capital through the issuance of notes to investors and making loans secured by
3 real estate with the funds raised. *See Case No. 11-49803-RLE-11* (Bankruptcy Dkt. 101). In
4 reality, MF08 was part of a fraudulent scheme perpetrated by Walter and Kelly Ng in which
5 investors' money was funneled from MF08 to R.E. Loans LLC ("R.E. Loans"), another company
6 that was also owned and controlled by the Ngs. R.E. Loans was an investment company that
7 issued secured loans to real estate developers. The Ngs owned and managed The Mortgage Fund,
8 LLC ("TMF"), which was MF08's sole owner, manager, and member. Bar-K, Inc., an affiliated
9 entity owned by Kelly Ng and his brother Barney, served as MF08's loan servicer and broker.

10 Appellees A Very Nice Pool Company, Ltd. ("Pool"), Paul and Patricia Cianci ("Cianci"),
11 and Mari DeMarsh² ("DeMarsh") invested money with R.E. Loans, and they withdrew their
12 money in 2008. R.A. at UE 000050, UE000057, UE000064.³

13 On September 12, 2011, several investors of MF08 filed a Chapter 7 involuntary
14 bankruptcy petition against MF08 in the Bankruptcy Court for the Northern District of California.⁴
15 *See Case No. 11-49803-RLE-11* (Bankruptcy Dkt. 1). On February 3, 2012, the Bankruptcy Court
16 appointed appellee Susan L. Uecker as the Liquidating Trustee of the Mortgage Fund '08
17 Liquidating Trust ("Trustee") pursuant to a Liquidating Trust Agreement. (Bankruptcy Dkt. 101).

18 On September 9, 2013, the Trustee filed 17 complaints, all arising out of similar
19 transactions. Among the complaints are these three cases, in which the Trustee alleged, *inter alia*,
20 that appellees were investors in R.E. Loans and that at no time did any appellee invest any money
21 in MF08. *Pool* Complaint ¶ 17 (R.A. at UE000050); *Cianci* Complaint ¶ 17 (R.A. at p.
22 UE000057), *DeMarsh* Complaint ¶ 17 (R.A. at UE000064). The complaints alleged that funds

24 ² Mari DeMarsh is the executor and trustee of the estate of Dr. Revels M. Clayton, in his
25 capacity as former trustee for the Revels M. Clayton MD Inc. Pension Plan 2 ("the Plan"). The Plan
was an investor in R.E. Loans.

26 ³ "R.A. at UE---" refers to the record filed by appellant, located at Dkt. 13 in 15-cv-77 SI.

27 ⁴ The Bankruptcy Court subsequently entered an order converting the case to one under
28 Chapter 11 of the Bankruptcy Code. *See Case No. 11-49803-RLE-11* (Bankruptcy Dkt. 11).

1 were transferred from MF08's account at Wells Fargo Bank to each of the appellees, and that the
2 transfers were fraudulent. *Pool* Complaint ¶¶ 17-19 (R.A. UE000050), *Cianci* Complaint ¶¶ 17-
3 19 (R.A. at UE000057), *DeMarsh* Complaint ¶¶ 17-19 (R.A. at UE000064). The complaints
4 alleged two claims: (1) a claim to avoid transfer and recover the monies paid to appellees under
5 Cal. Civ. Code §§ 3439.04(a)(1) and 3439.07 on the grounds that they were paid with actual
6 fraudulent intent to hinder, delay and defraud MF08's creditors; and (2) a claim to avoid transfer
7 and recover those monies under Cal. Civ. Code §§ 3439.04(a)(2) and 3439.07 on the grounds that
8 the monies paid to appellees was constructively fraudulent. *See id.*

9 On October 8, 2013, appellees Pool and Cianci answered the complaints, attaching as
10 exhibits documents showing that the funds were transferred from TMF's bank account, not from
11 MF08's. *Pool* Answer ¶ 17, Ex. A (R.A. UE000070, UE000078-79), *Cianci* Answer ¶ 17, Ex. A
12 (R.A. at UE000082, UE000090-91). On November 8, 2013, appellee DeMarsh filed an answer
13 which, *inter alia*, admitted that at certain times the Plan had invested money with R.E. Loans,
14 LLC, and denied that the Plan received any money from MF08 or from a Wells Fargo account.
15 (*DeMarsh* Answer ¶¶ 11, 17 (R.A. at UE000092-98, UE000095)).

16 On December 3, 2013, the Bankruptcy Court held an initial status conference in the 17
17 adversary proceedings filed by the Trustee. R.A. at Plan 000747-792 (transcript of Dec. 3, 2013
18 status conference).⁵ During the conference, after noting that the Trustee wished to amend the
19 complaints, the Bankruptcy Court inquired why the Trustee had filed complaints alleging that
20 fraudulent transfers were made by MF08 to appellees when the record before the Bankruptcy
21 Court showed that the payments had been made by TMF and not MF08. R.A. at Plan 000763-64.
22 Specifically, the Bankruptcy Court noted that the Trustee's former counsel, Iain Macdonald, had
23 filed a declaration on August 6, 2012, in a related adversary proceeding (*Uecker v. Kelly Ng et al.*,
24 Case No. 11-49803-RLE-11; Adv. Proc. No. 12-04099-RLE), in which Mr. Macdonald outlined
25 the "scheme" by which money was transferred from MF08 to R.E. Loans through TMF.⁶ The

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27 ⁵ "R.A. at Plan---" refers to the record filed by appellee DeMarsh, located at Dkt. 16 in 15-
cv-77 SI.

28 ⁶ The Macdonald declaration is located at R.A. at UE000351-79. In his declaration, Mr.

1 bankruptcy court stated,

2 One of the things that it struck me as odd is the way the complaint was drafted, and
3 it talks about the money coming from the Mortgage Fund '08 account to these
4 people or to these defendants. And Mr. Brower [counsel for a number of the
5 defendants] had no problem producing multiple documents showing that the funds
6 appear to be coming out of the Mortgage Fund account. And I'm just curious why it
7 is that your firm didn't have that information, because I've got a declaration from
8 Mr. Macdonald of Macdonald Fernandez. This was filed in case number 11-49803.
9 He signed this declaration on August 6, 2012, well after the settlement was
10 reached, apparently in June of 2012. But he has his declaration going through as to
11 what happened. He attaches a very detailed letter from Barney Ng's counsel to the
12 managing members of R.E. Loans, LLC, outlining everything that went on, along
13 with – that's Exhibit A. And then Exhibit B is a handwritten letter or what's
14 purported to be a handwritten letter or statement from Mr. Ng, though it's not
15 signed, basically accounting. And it attaches documents from R.E. Loans, Inc.

16 I was just curious why it is that the trustee, who's been involved in this case so
17 long, failed to realize where the money was actually coming from with regards to
18 these defendants.

19 R.A. at Plan 000763-64.

20 The Bankruptcy Court and counsel for the Trustee and the adversary proceeding
21 defendants (appellees here) then discussed the contents of Mr. Macdonald's declaration. Mr.
22 Brower, counsel for appellees A Very Nice Pool Company and Paul and Patricia Cianci, stated,

23 Mr. Brower: [I]f you look at the Iain Macdonald declaration in the exhibit
24 following the Barney Ng note, you'll see that it is R.E. Loan's account record for
25 the Mortgage Fund, LLC. And if you look down at, you'll see in pencil writing the
26 names of my clients that are right on that document. . . . And what it shows is it
27 shows that – and there's \$4 million there if you look at – again, that's the missing \$4
28 million. And if you look at that, you will see that – I look at my checks – every
time there was a check from the Mortgage Fund, LLC to an R.E. Loans investor, it
said, "Advance R.E. Loans" right on the check. And then the – the counter-
balancing entry in the books with the purchase of my client's rights or interests by
the Mortgage Fund. It says right on there: "Bought share" –

29 The Court: Right. There's a distinction I want to point out that this isn't an issue
30 where Mortgage Fund '08 upstreamed the money to R.E.L. who then used the
31 money and then in exchange for that money allegedly transferred interest in real
32 property back to Mortgage Fund '08 in order to pay down noteholders. There is a
33 significant – I think it's over \$4 million, where Mortgage Fund actually acquires the
34 interest. It's – it – basically they were purchasing the R.E.L. noteholders' interest.
35 So that's a different issue from, "Oh, the money went to R.E.L. and then R.E.L.

36 Macdonald stated, *inter alia*, that TMF was the manager of MF08; that the R.E. Loans ledger for
37 TMF indicated that TMF had an "investment" in R.E. Loans in the amount of \$4,231,740.37; that
38 TMF was a vehicle for transferring funds from MF08 to R.E. Loans; and that "[e]ach transfer from
39 Mortgage Fund LLC to RE Loans matches the corresponding payout to an individual noteholder
40 of RE Loans." R.A. at UE000353.

1 then used it to pay down the noteholders." This is where Mortgage Fund '08, and
2 there's even correspondence, where I think one of the defendant says, "I need to get
3 cashed out. Is someone willing [to buy] my interest"; and the next thing, Mortgage
4 Fund ends up acquiring this gentleman's interest.

5 *Id.* at Plan 000765-67.

6 The Bankruptcy Court also noted that the defendants in the adversary proceedings
7 contended that the Trustee's claims were covered and barred by the terms of a settlement that the
8 Trustee had entered into with R.E. Loans in the separate R.E. Loans bankruptcy.⁷ *Id.* at Plan
9 000752-53, 000757-59, 000767-72. The Bankruptcy Court noted that "there seems to be a serious
10 issue of whether the compromise excludes these . . . defendants[,] with the Trustee, on the one
11 hand, taking the position that her claims in the adversary proceedings were not barred because the
12 R.E. Loans settlement only released claims against R.E. Loans noteholders who received
13 payments directly from R.E. Loans; and the adversary proceeding defendants, on the other hand,
14 asserting that the Trustee's claims had been released because the R.E. Loans settlement waived all
15 claims against R.E. Loans noteholders who received payments from R.E. Loans (whether directly
16 or through another entity), and the release waived the protections of California Civil Code Section
17 1542. *See generally id.* The Bankruptcy Court inquired, "[i]f Ms. Uecker knew about this and
18 when she negotiated the settlement in June of 2012 in Texas with the mediator, Judge Newsome,
19 Retired, why didn't she specifically spell out the 17 individuals are not part of the settlement[?]"
20 *Id.* at Plan 000768. The bankruptcy court noted that "[t]he pleadings are really sloppy," *id.* at Plan
21 000779, and then set a schedule for briefing the Trustee's motion to amend the complaints. *Id.* at
22 Plan 000784.

23 On December 19, 2013, the Trustee sought leave to amend the complaints to allege that the

24

⁷ On September 13, 2011, R.E. Loans filed a voluntary Chapter 11 case in the United
25 States Bankruptcy Court, Northern District of Texas (Case No. 11-35865). On January 27, 2012,
26 the Trustee filed a Proof of Claim for MF08 in the amount of \$66,226,496 in the R.E. Loans
27 bankruptcy. R.A. at UE000339-45. The Proof of Claim states that the basis for the claim is
28 "Money had and received." *Id.* at UE000340. In 2012, the Trustee entered into a settlement
agreement with R.E. Loans. *Id.* at UE000210-18. Under the settlement agreement, R.E. Loans
agreed that MF08's Proof of Claim would be allowed as a general unsecured claim in exchange for
MF08's release of all claims against holders of RE Loans' Exchange Notes who received payments
from R.E. Loans. *Id.* at ¶¶ 1-4. The settlement agreement also provided that, with regard to the
release of MF08's claims, MF08 expressly waived any and all rights under California Civil Code
Section 1542. *Id.* ¶ 4.02.

1 funds were transferred by MF08 to TMF and then to appellees, as opposed to directly from MF08
2 to appellees as had been alleged in the original complaints. R.A. at UE000099-100, R.A. at
3 UE000123-24, R.A. at UE000146-47. Appellees Pool and Cianci opposed the motions to amend
4 and argued that leave to amend should be denied because the original complaints violated Rule
5 9011 and the Trustee did not have standing to bring the Complaints. R.A. at UE000179-81, R.A.
6 at UE000185-87. Appellee DeMarsh also opposed amendment, arguing that the allegations in the
7 complaint were made in bad faith in violation of Federal Rule of Civil Procedure 11, the proposed
8 amendment was futile, the Trustee unduly delayed in seeking amendment, and that appellee
9 DeMarsh was unduly prejudiced by the Trustee bringing the action near the end of the running of
10 the statute of limitations. R.A. at UE000195-99.

11 A hearing on the Trustee's motions for leave to amend the complaints was set for January
12 23, 2014, and subsequently continued. *See* R.A. at UE000397. On August 5, 2014, the
13 Bankruptcy Court held a status conference at which the court informed all parties that it intended
14 to issue a tentative ruling granting the Trustee's motions for leave to amend on the condition that
15 the Trustee pay the reasonable attorneys' fees and/or costs for each defendant who had opposed the
16 Trustee's motions for leave to amend. *Id.* at UE000443. On August 12, 2014, the Bankruptcy
17 Court entered the tentative ruling, which stated that if no objections were filed within 21 days of
18 the date of the tentative ruling, it would become the court's final ruling. *Id.* at UE000407-12.

19 On September 2, 2014, the Trustee filed a timely objection to the tentative ruling. *Id.* at
20 UE000453-58. On September 25, 2014, the Bankruptcy Court held a status conference and a
21 hearing on the Trustee's motions to amend and objection to the tentative ruling. *Id.* at UE000466-
22 91. At the September 25, 2014 hearing, the Bankruptcy Court granted the motions to amend as
23 stated in the tentative ruling, and explained its reasoning as follows:

24 Before the Court are nine motions for leave to amend brought by plaintiff under
25 Rule 15, applicable here by Bankruptcy Rule 7015.9, 7015. Nine defendants filed
26 oppositions to these motions. The original complaint alleged that the avoidable
27 transfers have been made by MF '08 and the proposed first amended complaint
28 attached to the declarations of Robert Retana in support of each motion alleged that
the avoidable transfers were made by MF '08 to the Mortgage Fund, LLC and then
to defendants using funds that can be traced to MF '08. The Rule 15 motions were
filed after these nine defendants answered the original complaints and most of their
answers attached documentary evidence that contradicted the essential allegations

1 of the original complaints. That is, the checks attached to the answer showed that
2 the challenged transfers have been from MF, LLC, not from MF '08. With the
3 exception of two wire transfers from defendants Cayton and Tishman. . . .

4 The Rule 15 motions offered no explanation for the – for this inaccurate pleading.
5 They only argue that the amendments are simply to ["]Make a helpful clarification
6 in order to avoid confusion["]. The oppositions argue that plaintiff could have filed
7 accurate complaints because she was aware of the facts regarding how these related
8 entities conducted their business well before these complaints were filed.

9 * * * *
10

11 After considering this record in the context of the MF '08 Chapter 11 case, the
12 Court will make the tentative ruling final. The Court exercises its discretion to
13 allow amendments and require the payment of reasonable attorney's fees and costs
14 as outlined in the tentative ruling as a consideration into doing this.

15 [The Court then discussed the law regarding amendments to complaints, and cited
16 four cases for the proposition that a court "may impose costs pursuant to Rule 15 as
17 a condition for granting leave to amend in order to compensate the opposing party
18 for additional costs incurred because the original pleading was faulty."]

19 Here we have no undue delay in light of the fact that the motions were filed
20 promptly after the answers were filed. We also have no dilatory motive. What we
21 have here is a contention that accurate complaints could have been filed in the first
22 place and there is prejudice to the defendants in having had to respond to the
23 original complaints pointing out the defect and respond to the motions for leave to
24 amend when this should not have been necessary. The defendants assert that the
25 trustee's drafting was careless at best or, if she was trying to plead around a
26 substantive defense regarding initial and subsequent transferee status, her drafting
27 was intentional, at worst. Defendants appear, perhaps understandably, offended by
28 the fact that they had to point this out in their answers and pointed again in their
oppositions to the motions for leave to amend.

29 However, it is true that if amendment is allowed, no extra discovery will be
30 required since no substantive discovery has been done yet. It is also true that no
31 trial date will be changed if an amendment is permitted. It is true that the issue
32 regarding who was the initial transferee has always been there to some extent as has
33 the issue regarding who was the transferor. It is also true that allowing amendment
34 will not change the key witnesses will be or what the key documentary evidence
35 will be. All these factors weigh against a finding of prejudice.

36 It is clear to the Court that leave to amend is appropriate and it would be abuse – it
37 would abuse its discretion if it were to deny leave to amend. Nonetheless, the Court
38 finds sufficient prejudice to support its exercise of discretion in imposing a
39 reasonable condition on the leave to amend in the context of these adversary
40 proceedings.

41 The Court is sympathetic to the defendants' sense of frustration for several reasons.
42 While the Court is not basing its ruling on Rule 9011, it does in large part set the
43 standard. Rule 9011(b)(3) provides that by presenting a pleading to the court, an
44 attorney is certifying that to the best of the person's knowledge, information, and
45 belief formed after inquiry, reasonable in the circumstances, the allegations or other
46 factual contentions have evidentiary support.

1 First, it is not disputed that in January of 2012, MF '08 filed a proof of claim in the
2 RE Loans Chapter 11 case in Texas, in which MF '08 stated, "Between December
3 4th, 2007 and February 4th, 2009, things⁸ caused the aggregate sum of \$60 million
4 -- \$66 million to be transferred from MF '08's bank accounts to RE Loans, the cash
5 transfers[.]

6 The cash transfers were made either directly to RE Loans, indirectly through MF or
7 Bar K, or to the RE Loans' borrowers to enable such borrowers to service to repay
8 loans extended to them by RE Loans[.]

9 It is also undisputed that in June of 2012, the trustee entered into a settlement into
10 the RE Loans case by which the proof of claim was allowed in exchange for her
11 support of confirmation of the REL plan and the REL noteholders. These
12 defendants were urged to support this plan and compromise, and did support it on
13 the premise that, ["]all MF '08 avoidance actions["] would be released. In exchange
14 they agreed to reduction in the allowed amount of their claims. At this point the
15 Court sees no appropriate way for the trustee to distance herself from the statement
16 in her own proof of claim, but the meaning of this release language will be resolved
17 another day.

18 Second, the trustee's former counsel, Iain Macdonald, filed a declaration in
19 Adversary Proceeding Number 1204099, Uecker versus Kelly Ng, on August 6th,
20 2012, at docket number 32-1, in which he stated at page 3 that he had received
21 information from Barney Ng, an insider, to the effect that, ["]The Mortgage Fund
22 LLC was a vehicle for transferring funds from MF '08 to RE Loans and its monies
23 belonged to MF 08["].

24 The declaration goes on to state that the transfers from Mortgage Fund LLC to RE
25 Loans matched corresponding payouts to individuals, RE Loans noteholders.

26 Third, Mr. Brower's response to the tentative ruling describes a sequence of events
27 that at least raises the inference that the trustee knew much earlier than she now
28 contends, that she was made aware of the fact that money flowed in ways that
contradict the allegations in the original complaints.

29 All of this is enough to confirm that when the trustee filed these complaints in
30 September of 2013 the allegations were incorrect and could have been stated
31 correctly. Accordingly, the Court finds that requiring the trustee to pay the
32 reasonable attorney's fees and costs for the seven represented defendants and the
33 reasonable costs of the two pro se defendants is within the discretion accorded to
34 the Ninth Circuit authority referred to above.

35 *Id.* at UE000472-79; *see also id.* at UE000512-18 (written orders granting motions for leave to
36 amend). In the Bankruptcy Court's Order granting the Trustee's motions to amend, the Court gave
37 the appellees a period of time to file and serve a declaration of the fees and costs sought and
38 provided that a motion should be filed if the parties were unable to informally resolve the amount
39 of fees and costs. *Id.* at UE000513.

40 ⁸ The transcript states "things" and it is unclear if this is a typographical error.

1 On September 26, 2014, appellee DeMarsh filed her attorney's declaration seeking
2 \$38,161.10 attorney's fees and costs pursuant to the court order. *Id.* at UE000492-511. On
3 October 17, 2014, the Trustee filed an objection to DeMarsh's claimed fees. *Id.* at UE000533-49.
4 On November 20, 2014, the Bankruptcy Court held a hearing on the Trustee's objection to
5 DeMarsh's claimed fees. *Id.* at UE000652-63. The Bankruptcy Court conducted an *in camera*
6 review of the billing statements provided by DeMarsh's attorney, and entered an order on
7 December 3, 2014 approving fees and costs in a total amount of \$36,011.10. *Id.* at UE000674-76.
8 That order provided that if the Trustee did not pay DeMarsh's fees and costs within 14 days, the
9 Bankruptcy Court would dismiss with prejudice the adversary proceeding upon request of the
10 appellee. *Id.* at UE000676. The Trustee did not pay the fees, and on December 18, 2014,
11 DeMarsh filed an Ex Parte Application for Entry of Order Dismissing Adversary Proceeding for
12 Failing to Comply with a Court Order. *Id.* at UE000692-97. On December 19, 2014, the
13 Bankruptcy Court entered an Order Dismissing Adversary Proceeding With Prejudice for Failing
14 to Comply with Court Order. *Id.* at UE000705-06.

15 On October 15, 2014, the attorney representing appellees Pool and Cianci (and four other
16 adversary proceeding defendants) filed declarations seeking a total of \$16,000 in fees and costs for
17 the six cases, with a pro rata allocation of \$1,248 for Pool and \$704 for Cianci. *Id.* at UE000519-
18 26. On November 14, 2014, the Trustee filed an objection to Pool's and Cianci's claimed fees. *Id.*
19 at UE000627-37. Based upon the papers submitted, the Bankruptcy Court found that appellees
20 Cianci's and Pool's attorney's total request of \$16,000 in fees was reasonable, and the court took no
21 position on the pro rata allocation of fees of \$1,248 to Pool and of \$704 to Cianci. *Id.* at
22 UE000669-72. The Trustee did not pay the fees and voluntarily dismissed those cases with
23 prejudice. *Id.* at UE000682. On December 19, 2014, the bankruptcy court entered orders
24 dismissing those cases with prejudice. *Id.* at UE000699-703.

25 On December 31, 2014, the Trustee filed these appeals. On appeal, the Trustee contends
26 that the Bankruptcy Court abused its discretion by granting the Trustee's motions for leave to
27 amend the complaint on the condition that the Trustee pay the appellees' reasonable fees and
28

1 costs.⁹ The Trustee also contends that the Bankruptcy Court erred by dismissing the *DeMarsh*
2 complaint.

3

4 **LEGAL STANDARD**

5 The decision to grant leave to amend conditioned upon the imposition of costs is reviewed
6 for abuse of discretion. *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500,
7 1513 (9th Cir. 1995). To determine whether a court has abused its discretion, "we first look to
8 whether the trial court identified and applied the correct legal rule to the relief requested." *United*
9 *States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). "Second, we look to whether the
10 trial court's resolution of the motion resulted from a factual finding that was illogical, implausible,
11 or without support in inferences that may be drawn from the facts in the record." *Id.*; *see also In*
12 *re Tracht Gut, LLC*, 503 B.R. 804, 810 (9th Cir. B.A.P. 2014) (citing *Hinkson* and stating that "[a]
13 bankruptcy court abuses its discretion if it applies an incorrect legal standard or misapplies the
14 correct legal standard, or its factual findings are illogical, implausible or without support from
15 evidence in the record.").

16 A decision to dismiss an action for failure to file an amended complaint in a timely manner
17 is reviewed for an abuse of discretion. *Ordonez v. Johnson*, 254 F.3d 814, 815-16 (9th Cir. 2001)
18 (per curiam).

19 The trial court's decision may be affirmed on any ground supported by the record. *Atel*
20 *Financial Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

21

22

23 ///

24 ///

25

26 ⁹ Although the Trustee states that each appeal also presents the question of whether the
27 Bankruptcy Court erred in determining the specific amount of fees and costs to be paid in each
28 case, the Trustee does not advance any argument challenging the Bankruptcy Court's fee
assessments. In any event, the Court finds no error in the Bankruptcy Court's determination of the
reasonable fees and costs to be paid in each case.

1
DISCUSSION2
I The Trustee Did Not Waive the Right to Appeal *Cianci and A Very Nice Pool Co., Ltd.*

3 Appellees Paul and Patricia Cianci and A Very Nice Pool Company, Ltd., contend that the
4 Trustee waived her right to appeal by requesting that the Bankruptcy Court dismiss the two cases
5 with prejudice without expressly reserving her right to appeal. Appellees also seek sanctions
6 against the Trustee for prosecuting frivolous appeals.

7 The Court finds that the Trustee did not waive her right to appeal by requesting the
8 Bankruptcy Court to dismiss the cases with prejudice. The Ninth Circuit has "repeatedly
9 recognized that voluntary dismissals with prejudice that produce an adverse final judgment may be
10 appealed." *Ward v. Apple, Inc.*, 791 F.3d 1041, 1045 (9th Cir. 2015) (citing authority). "A
11 voluntary dismissal with prejudice permits the appellate court to review the action of the district
12 court that the plaintiff believes to be determinative of his claim—the action that caused him to
13 dismiss his case." *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995).

14 Appellees do not address the Ninth Circuit authority holding that a party may appeal a
15 voluntary dismissal with prejudice. Instead, appellees rely on inapposite case law addressing
16 whether a party may appeal from a consent decree. *See, e.g., Pacific Railroad v. Ketchum*, 101
17 U.S. 289, 295 (1879) (holding Court had jurisdiction to review appeal from consent decree but
18 "we cannot consider any errors that may be assigned which were in law waived by the consent");
19 *Luna v. Apfel*, 986 F. Supp. 275 (D.N.J. 1997) (analyzing appealability of consent judgment to
20 remand case to Social Security Administration). Appellees argue that "[t]he orders of dismissal
21 with prejudice are, functionally, consent judgments without an express reservation of the right to
22 appeal." Cianci/Pool Brief at 1. However, in *Concha*, the Ninth Circuit distinguished between
23 voluntary dismissals with prejudice and dismissals pursuant to a settlement, and clarified that
24 while a plaintiff "may appeal from a voluntary dismissal with prejudice," a plaintiff may not
25 "appeal from a joint stipulation to voluntary dismissal, entered unconditionally by the court
26 pursuant to a settlement agreement." *Concha*, 62 F.3d at 1057. Here, the Trustee is appealing
27 from voluntary dismissals with prejudice and is not seeking to appeal a dismissal pursuant to a
28 settlement agreement or consent judgment.

1 Accordingly, the Court finds that the Trustee did not waive her right to appeal by
2 requesting a voluntary dismissal with prejudice of the *Pool* and *Cianci* cases. Because the Court
3 concludes that the Trustee did not waive her right to appeal, the Court concludes that the appeals
4 are not frivolous and DENIES appellees' motion for sanctions.

5

6 **II. The Bankruptcy Court Did Not Abuse Its Discretion in Granting Leave to Amend
Conditioned Upon Payment of Reasonable Fees and Costs**

7 The Trustee contends that the Bankruptcy Court abused its discretion by granting the
8 Trustee's motions for leave to amend the complaint on the condition that the Trustee pay the
9 appellees' reasonable fees and costs. The Trustee contends that the Bankruptcy Court applied an
10 incorrect legal standard to find that appellees had suffered prejudice. The Trustee argues that
11 because the Trustee sought to amend the complaints early in the litigation, granting the motions to
12 amend unconditionally would not have resulted in any prejudice, such as the need to reopen
13 discovery or causing a delay in the proceedings.

14 The Ninth Circuit has held that "a district court, in its discretion, may impose costs
15 pursuant to Rule 15 as a condition of granting leave to amend in order to compensate the opposing
16 party for additional costs incurred because the original pleading was faulty." *General Signal*
17 *Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1514 (9th Cir. 1995) (citing *Firchau v.*
18 *Diamond Nat'l Corp.*, 345 F.2d 269, 275 (9th Cir. 1965)); *see also Firchau*, 345 F.2d at 275 ("In
19 the exercise of its discretion in acting upon such a motion the district court may, if it grants the
20 motion, prescribe as a condition reasonable terms compensating appellee for any loss or expense
21 occasioned by Firchau's failure to file adequate pleadings in the first instance.").

22 The Court concludes that the Bankruptcy Court did not abuse its discretion when it granted
23 the Trustee's motions to amend the complaints conditioned upon the payment of reasonable fees
24 and costs. First, the Bankruptcy Court identified the correct legal standard to evaluate the
25 Trustee's motions to amend. RA at UE000472-79. Second, the Bankruptcy Court's application of
26 that standard is well-reasoned and supported by the record. The Bankruptcy Court analyzed the
27 *Foman v. Davis*, 371 U.S. 178 (1962), factors and concluded that it would be an abuse of
28 discretion to deny leave to amend. *Id.* at UE000474-76. However, the Bankruptcy Court found

1 that the record supported conditioning leave to amend upon a payment of reasonable fees and
2 costs because the adversary proceeding defendants had incurred "additional costs . . . because the
3 original pleading was faulty." *Id.* at UE000475 (citing *General Signal Corp.*, 66 F.3d at 1514).
4 The Bankruptcy Court found that when the Trustee filed the original complaints in September
5 2013, the allegations regarding how the money flowed were incorrect and the Trustee possessed
6 information showing that the allegations were incorrect, including Mr. Macdonald's declaration in
7 the *Uecker v. Kelly Ng* adversary proceeding, such that the Trustee could have stated the
8 allegations correctly from the outset. *Id.* at UE000477-79. The Bankruptcy Court found that the
9 Trustee had not explained why the allegations were incorrect, and that because the allegations
10 were incorrect, appellees were required to point out the inaccuracies both in their answers and in
11 opposing the motions to amend. *Id.* at UE000476. On this record, the Court cannot conclude that
12 the Bankruptcy Court's findings "are illogical, implausible or without support from evidence in the
13 record." *Hinkson*, 585 F.3d at 1251.

14

15 **III. The Bankruptcy Court Did Not Abuse Its Discretion by Dismissing the *DeMarsh* Case**

16 The Trustee also contends that the Bankruptcy Court erred by dismissing the *DeMarsh*
17 case because at the time of dismissal "there was no motion attacking the pleading before the
18 Bankruptcy Court," and "[d]ismissal is only proper where the plaintiff can prove no set of facts in
19 support of the claim that would entitle him to relief." App. Opening Brief at 21 (internal citations
20 omitted).

21 However, as appellee DeMarsh notes, the Bankruptcy Court did not dismiss the case for
22 failure to state a claim. Instead, the Bankruptcy Court dismissed the case after the Trustee failed
23 to comply with the Bankruptcy Court's order allowing her to file an amended complaint
24 conditioned upon paying DeMarsh's fees and costs by a date certain.

25 The Court reviews the Bankruptcy Court's decision to dismiss the *DeMarsh* case for failure
26 to comply with the court's order for an abuse of discretion. *Ordonez v. Johnson*, 254 F.3d 814,
27 815-16 (9th Cir. 2001) (per curiam). The Court finds there was no abuse of discretion. The
28 Bankruptcy Court's December 3, 2014 order provided that if the Trustee did not pay DeMarsh's

1 fees and costs within 14 days, the Bankruptcy Court would dismiss with prejudice the adversary
2 proceeding upon request of the appellee. *Id.* at UE000676. The Trustee did not pay the fees, and
3 on December 18, 2014, DeMarsh filed an Ex Parte Application for Entry of Order Dismissing
4 Adversary Proceeding for Failing to Comply with a Court Order. *Id.* at UE000692-97. On
5 December 19, 2014, the Bankruptcy Court entered an Order Dismissing Adversary Proceeding
6 With Prejudice for Failing to Comply with Court Order. *Id.* at UE000705-06. Thus, the record
7 demonstrates that the Trustee was on notice that the case would be dismissed with prejudice if the
8 Trustee did not pay the fees within 14 days of the December 3, 2014 order.

9

10 **CONCLUSION**

11 For the reasons set forth above, the Court AFFIRMS the Bankruptcy Court's orders and
12 DENIES the appellees' motion for sanctions.

13

14 **IT IS SO ORDERED.**

15

16 Dated: September 25, 2015

17 
18 SUSAN ILLSTON
19 United States District Judge